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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/596,490

02/09/2007

Rodrigo Fuscelli Pytel

033794/313056

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02/17/2009

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EXAMINER

BLAKELY III, NELSON CLARENCE

ART UNIT

PAPER NUMBER

1614

MAIL DATE

DELIVERY MODE

02/17/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/596,490	<b>Applicant(s)</b> FUSCELLI PYTEL ET AL.	
	<b>Examiner</b> NELSON C. BLAKELY III	<b>Art Unit</b> 1614	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 21 November 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above claim(s) 11, 12 and 22-30 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 and 13-21 is/are rejected.
- 7) ☒ Claim(s) 2-10 and 13-21 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 15 June 2006 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### ***Application Status***

Claims 1-30 of the instant application are pending. Claims 11, 12 and 22-30 are withdrawn pursuant to Applicant's Response, filed 11/21/2008. Accordingly, instant claims 1-10 and 13-21 are presented for examination on their merits.

### ***Election/Restrictions***

Applicant's election **without traverse** of Group I, drawn to a cosmetic composition, in the reply filed on 11/21/2008, is acknowledged.

Applicant elected wherein:

- (a) a filmogenic agent is cyclomethicone;
- (b) an additional emulsifying system is fatty alcohol; and
- (c) a sunscreen system is cinnamic acid.

Claims 11, 12 and 22-30 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without traverse** in the reply filed on 11/21/2008.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

***Priority***

Receipt is acknowledged of the Brazilian application PI 0308051.0, filed 12/15/2003, submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file. It is worth noting that Applicant has not provided an English translation of the priority document.

***Applicant's Amendment***

Applicant's Preliminary Amendment, filed 06/15/2006, wherein claims 2-30 are amended, is acknowledged.

***Drawings***

The drawings are objected to because, on the y-axis of Figure 1, Applicant is encouraged to use a decimal point to mark the boundary between the integral and fractional parts of a decimal numeral in lieu of a comma. For example, as in U.S. practice, Applicant is encouraged to use the recitation "0.00" in lieu of "0,00". Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and

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where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency.

Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Specification***

Applicant is reminded of the proper language and format for an abstract of the disclosure.

The abstract should be in narrative form and generally limited to a single paragraph on a separate sheet within the range of 50 to 150 words. It is important that the abstract not exceed 150 words in length since the space provided for the abstract on the computer tape used by the printer is limited. The form and legal phraseology often used in patent claims, such as "means" and "said," should be avoided. The abstract should describe the disclosure sufficiently to assist readers in deciding whether there is a need for consulting the full patent text for details.

The language should be clear and concise and should not repeat information given in the title. It should avoid using phrases which can be implied, such as, "The disclosure concerns," "The disclosure defined by this invention," "The disclosure describes," etc.

The abstract of the disclosure is objected to because Applicant recites the legal phrase "comprising" in line 1. Correction is required. See MPEP § 608.01(b).

The disclosure is objected to for the following informalities:

On page 9, 22, Applicant is encouraged to correct the misspelled term “zuiterionic” to “zwitterionic”.

On page 19, line 7, Applicant is encouraged to correct the misspelled term “triptofane” to “tryptophan”.

The lengthy specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which applicant may become aware in the specification.

Appropriate correction is required.

### ***Claim Objections***

Claims 2-10 and 13-21 are objected to because of the following informalities:

With regard to claims 2-10 and 13-21, Applicant is encouraged to use the term “The” in lieu of “A” in the dependent claims, i.e., “A cosmetic composition according to claim 1, ...”.

With regard to claim 7, Applicant is encouraged to remove the “: (colon)” after the recitation “...an additional emulsifying system selected from the group consisting of...” according to proper Markush claim practice.

With regard to claim 10, Applicant is encouraged to remove the “: (colon)” after the recitation “...sunscreen system is composed of a combination between...” according to proper Markush claim practice.

Appropriate correction is required.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-9, 13-16 and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Guskey *et al.* (U.S. Patent No. 5,976,514), in view of Brandt *et al.*

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(U.S. Patent No. 6,696,067B2), as evidenced by Filipski *et al.* (U.S. Patent Publication No. 2003/0124083A1).

With regard to instant claims 1-9, 13-16 and 19-21, Guskey *et al.* disclose in reference claims 1, 9, 10 and 17, a(n) antiperspirant/deodorant (cosmetic) composition comprising (a) from about 0.01% to about 60% by weight of an antiperspirant/deodorant active, (b) from about 1% to about 60% by weight of a volatile, nonpolar hydrocarbon liquid, and (c) from about 1% to about 60% by weight of a mitigating material (filmogenic system), wherein the mitigating material is nonvolatile silicone, i.e., polydimethylsiloxane (dimethicone) and dimethiconol. In the instant excerpt, Guskey *et al.* further disclose wherein the composition further comprises a volatile silicone, i.e., cyclopentasiloxane, in reference claim 17. In column 8, lines 23-59, Guskey *et al.* disclose that mitigating material of the reference invention include any material effective in reducing skin irritation caused by the volatile, nonpolar hydrocarbon liquid component of the composition. Furthermore, in the instant excerpt, Guskey *et al.* disclose wherein the mitigating material component of the antiperspirant/deodorant composition may comprise one or more mitigating materials, which individually or collective, are at a concentration of from about 1% to about 60% by weight of the composition. In column 9, line 58, through column 10, line 52, Guskey *et al.* disclose nonlimiting examples of suitable silicone-containing mitigating materials to be included in the reference invention, such as trimethylsiloxysilicate, cyclomethicone and stearyl dimethicone. Additionally, Guskey *et al.* further disclose, in column 12, line 61 through column 13, line 3, suitable gelling agents, such as fatty alcohols, wherein the gelling agents are most



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typically used at concentrations ranging from about 1% to about 25% by weight of the composition.

Guskey *et al.* fail to disclose specifically wherein the cosmetic composition comprises polyethylene glycol-8 (PEG-8) dimethicone, the instantly claimed emulsifying system, in the range of 0.1% to 28.0% by weight, based on the total weight of the composition, or wherein the cosmetic composition comprises a body sunscreen for the skin of adults and children, body or face hydrating, self-tanning, sunscreen for the hair, a non-rinsable hair conditioner, or a rinsable hair preparation product. However, Brandt *et al.* disclose, in the Abstract, a cosmetically acceptable composition for treating hair skin and nails. In column 8, lines 45-59, Brandt *et al.* disclose wherein the cosmetically acceptable composition may be a shampoo, sunscreen, hand lotion, skin cream and conditioner, for example. Additionally, Brandt *et al.* disclose, in column 11, lines 27-57, and column 12, lines 34-52, wherein the cosmetically acceptable compositions may include fatty alcohols used in the formulation at a concentration of about 1 to about 10 weight percent, and polyethylene glycol, respectively. In column 12, line 53, through column 13, line 54, Brandt *et al.* disclose petrolatum or mineral oil components that may also be included, such as stearyl dimethicone, dimethicone, trimethylsiloxysilicate and cyclomethicone. Brandt *et al.* disclose, in column 15, line 60, through column 16, line 10, wherein the cosmetically acceptable composition may include one or more sunscreen active agents, such as diethanolamine p-methoxy cinnamate, which can be used from 0.1 to 10 percent by weight. Furthermore, in column 17, lines 6-23, Brandt *et al.* disclose where compositions for treating the skin include leave-on or rinse-off skin

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care products, such as lotions, hand/body creams, shaving gels or shaving creams, sunscreens, suntan lotions and after sun gels. In the instant excerpt, Brandt *et al.* further disclose that the conventionally used skin care compositions, such as fatty alcohols, must, in general, be safe for application to the skin, and must be compatible with the other components of the formulation, wherein the selection of these components is generally within the skill of the art. In Example 12, Brandt *et al.* disclose a leave-on or rinse-off conditioner or styling crème for the hair, as required by claims 20 and 21.

Neither Guskey *et al.* nor Brandt *et al.* disclose specifically wherein the emulsifying system contains at least PEG-8 dimethicone; however, Filipski *et al.* disclose, in reference claims 1-8, a shaving and moisturizing composition comprising 70 to 95% water, about 2 to 10% humectant, about 0.25 to 5 % silicone lubricant (PEG-8 dimethicone), and 0.01 to 5% sodium hyaluronate. In paragraph **[0010]**, Filipski *et al.* disclose wherein the water-based silicone lubricant may also be cyclomethicone.

Therefore, a skilled artisan would have envisaged the cosmetic composition comprising the instantly claimed filmogenic system, as disclosed by Guskey *et al. supra*, modified to include a polyethylene glycol, specifically PEG-8 dimethicone, as disclosed by Brandt *et al.*, and evidenced by Filipski *et al.* One of ordinary skill in the art would have been motivated to combine the teachings of the aforementioned references when seeking a cosmetic composition for treating the skin and hair, wherein treating includes improving such properties as retention of skin and hair moisture, attraction of air moisture and retardation of water loss. It would have been obvious to one of ordinary

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skill in the art, at the time of the invention, because the combined teachings of the prior art are fairly suggestive of the claimed invention.

Accordingly, the instant invention, as claimed in claims 1-9, 13-16 and 19-21, is *prima facie* obvious over the combination of the aforementioned teachings.

Claims 10, 17 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Guskey *et al.* (U.S. Patent No. 5,976,514), in view of Brandt *et al.* (U.S. Patent No. 6,696,067B2), as evidenced by Filipski *et al.* (U.S. Patent Publication No. 2003/0124083A1), as applied to claims 1-9, 13-16 and 19-21 above, and further in view of Fourman *et al.* (U.S. Patent No. 4,963,591) and Breton *et al.* (U.S. Patent 6,267,971B1).

The teachings of Guskey *et al.*, Brandt *et al.* and Filipski *et al.* are stated *supra*.

With regard to instant claims 10, 17 and 18, Guskey *et al.* fail to disclose specifically wherein the cosmetic product comprises an insect repellent product; however, Fourman *et al.* disclose, in the Abstract, skin care cosmetic formulations which include a cellulosic polymer/solvent system capable of dispersing thin, substantive films on the skin. In column 2, lines 17-36, Fourman *et al.* disclose where the compositions of the reference invention may include cosmetic ingredients chosen to provide a specifically tailored cosmetic composition having particular beneficial effects, such as sunscreens, insect repellents, moisturizers and deodorants. Additionally, in column 2, line 65, through column 3, line 39, Fourman *et al.* disclose emollient materials, such as volatile silicone fluids, i.e., cyclomethicone, that may be present in amounts ranging

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from 5.0% to 60.0%. In the instant excerpt, Fourman *et al.* disclose wherein a further desirable component in the composition is a plasticizer, such as dimethicone and trimethylsiloxysilicate. Furthermore, in the instant excerpt, Fourman *et al.* disclose wherein the composition may contain an ultraviolet absorbing sunscreen compatible with the insect repellent, wherein the sunscreen material is present in amounts ranging from 1.0% to 20.0% by weight of the total composition.

None of the aforementioned references disclose specifically wherein the sunscreen system is cinnamic acid; however, Breton *et al.* disclose, in the Abstract, a firming composition comprising cinnamic acid or at least one of its derivatives. In column 2, lines 12-19, Breton *et al.* recite cinnamic acid is known as an anti-ultraviolet active agent, for example. Breton *et al.* disclose, in column 3, lines 10-13, where cinnamic acid may be used in a range from  $10^{-6}\%$  to 10% by weight of the total composition. In column 6, lines 42-45, Breton *et al.* disclose where the cinnamic acid or its derivatives may be used in the preparation of cosmetic and/or pharmaceutical compositions, particularly dermatological compositions.

Therefore, a skilled artisan would have envisaged the claimed cosmetic composition, in view of the teachings of Guskey *et al.*, Brandt *et al.*, and evidenced by Filipski *et al. supra*, wherein the sunscreen is cinnamic acid, further comprising insect repellents, as disclosed by Fourman *et al.* and Breton *et al.* One of ordinary skill in the art would have been motivated to combine the teachings of the aforementioned references to when seeking a composition demonstrating water-proof, sunscreen and insect repellent properties, such as those desired during periods of warm weather, when

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outdoors, and subject to the discomforts of an excess of ultraviolet rays and of biting insects. It would have been obvious to one of ordinary skill in the art, at the time of the invention, because the combined teachings of the prior art are fairly suggestive of the claimed invention.

Accordingly, the instant invention, as claimed in claims 10, 17 and 18, is *prima facie* obvious over the combination of the aforementioned teachings.

### **Conclusion**

No claims allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NELSON C. BLAKELY III whose telephone number is (571) 270-3290. The examiner can normally be reached on Mon - Thurs, 7:00 am - 5:30 pm (EST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin H. Marschel can be reached on (571) 272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Phyllis G. Spivack/  
Primary Examiner, Art Unit 1614  
February 12, 2009

/N. C. B. III/  
Examiner, Art Unit 1614

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